Editor's note: Reconsideration and request for hearing denied by order dated Aug. 30, 1976

MEDINA FLYNN

IBLA 76-98 Decided January 12, 1976

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application, F-16859.

Affirmed.

1. Alaska: Native Allotments--Withdrawals and Reservations: Generally

   A Native allotment application for lands within a wildlife range withdrawal is properly rejected where the applicant did not initiate and complete substantial use and occupancy for a 5-year period prior to the effective date of withdrawal or segregation.

2. Alaska: Native Allotments

   The requirement of "substantially continuous use and occupancy of the land for a period of 5 years" applies to all applicants under the Alaska Native Allotment Act, regardless of where the land is situated.

APPEARANCES: Donald C. Mitchell, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Medina Flynn has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), which rejected her Native allotment application filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ and the pertinent

1/ The Alaska Native Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1973).

regulations, 43 CFR 2561. The application was rejected because the applicant had not completed the 5-year period of statutory use and occupancy prior to the effective date of the withdrawal of the applied-for land.

Appellant filed her application dated March 31, 1971, for lands within E 1/2 SE 1/4 sec. 31, T. 10 N., R. 84 W., Seward Meridian. She alleged seasonal use and occupancy for fishing and berrypicking from August of 1953 to the date of application. She claimed no improvements on the land.

The BLM land records show that appellant made application for land that lies within the Clarence Rhode National Wildlife Range. All lands within this wildlife range were withdrawn by Public Land Order 2213 of December 8, 1960, from all forms of appropriation under the public land laws. The original application for this withdrawal (F-012151) was noted on the BLM land records January 19, 1955. Since appellant does not claim use of the applied-for land before August of 1953, it is clear that at the time of the withdrawal application she had completed less than 2 years use and occupancy of her allotment.

The regulations in 43 CFR 2091.2-5(a) provide for the segregative effect of withdrawal applications. 2/ When a withdrawal application is noted on the official records of the appropriate BLM office, that application will segregate the land from further entry or disposal to the same extent as the proposed withdrawal. Thus, since lands within a wildlife range were withdrawn from appropriation, the filing of the application for the withdrawal had the same effect, i.e. it segregated the lands it described from appropriation on the day it was noted on the BLM records. Thurman Banks, 22 IBLA 205 (1975).

2/ 43 CFR 2091.2-5(a) provides:

"(a) Application. The noting of the receipt of the application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands."

The Native Allotment Act authorizes allotments only of vacant, unappropriated and unreserved public lands in Alaska. 43 CFR 2561.0-3. The allotment applicant is required by the Act to make satisfactory proof of "substantially continuous use and occupancy of the land for a period of 5 years." In this case, as we have indicated, on the date the land was segregated by the wildlife withdrawal application, appellant had not completed the required 5-year period of statutory use and occupancy. We have repeatedly held in similar situations where a Native has not completed the 5-year period of statutory use and occupancy prior to the effective date of withdrawal or segregation, the allotment application must be rejected. Susie Ondola, 17 IBLA 359 (1974); Thomas Akootchook, 17 IBLA 345 (1974); Christian G. Anderson, et al., 16 IBLA 56 (1974).

Appellant has presented nothing with this appeal to persuade us to overturn our previous holdings. The Bureau properly rejected appellant's application consistent with these holdings and the Secretary's Instruction of October 18, 1973. 3/

[2] Appellant argues that the Native Allotment Act only requires 5 years of use and occupancy if the application is for lands within a National Forest and appellant's allotment land is not within a National Forest. We have rejected this argument emphasizing that the 5-year requirement applies to all Native allotment applications, regardless of where the land is situated. Paul Koyukuk, 22 IBLA 247 (1975); Heldina Eluska, 21 IBLA 294 (1975).

The Native Allotment Act as originally passed by Congress in 1906 and, as amended and supplemented in 1956, authorizes the Secretary of the Interior to make allotments "in his discretion and under such rules as he may prescribe." 34 Stat. 197 (1906). The requirement of use and occupancy for 5 years has been such a

---

3/ The October 18 instruction, in pertinent part, provides:

"Use and Occupancy of Withdrawn or Reserved Lands. Vacant, unappropriated and unreserved land in Alaska is available for allotment under the Native Allotment Act. With respect to reserved or withdrawn land, if a Native has completed the 5-year period of statutory substantial use and occupancy prior to the effective date of the withdrawal or reservation, the withdrawal may be revoked and the allotment granted.

"As examples of application of the above, note the following:

* * * * * * *

"2. Where a Native has not completed the 5-year period of statutory use and occupancy of lands prior to the effective date of a withdrawal or reservation of the lands, the allotment application should be rejected."

"rule" at least since 1935. Allotments of Public Lands in Alaska to Indians and Eskimos, 55 I.D. 282, 285 (1935); see also 43 CFR 67.13 (1938 ed.). This regulation has been continued in substantially the same form until the present, 43 CFR 2561.2, although amended from time to time. The regulation and its successors clearly apply to all lands for which Alaska Native allotment applications were made. Therefore, even if the Act were to be construed as not expressly requiring 5-year use and occupancy prior to issuance of an allotment for unreserved public domain lands, valid regulations of the Department do impose such requirement. Heldina Eluska, supra.

Appellant has requested a hearing on the issue of her eligibility for an allotment. It is well settled that a Native allotment applicant is not entitled to a hearing as a matter of right inasmuch as the issuance of an allotment is discretionary with the Secretary of the Interior. Beulah Moses, 21 IBLA 157 (1975); Ann McNoise, 20 IBLA 169 (1975). The decision to hold hearings, if there are disputed facts, is also within the Secretary's discretion. Pence v. Morton, 319 F. Supp 1021 (D. Alaska, 1975). There are no such disputed facts in this case. Therefore, the request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Martin Ritvo
Administrative Judge

We concur:

_____
Anne Poindexter Lewis
Administrative Judge

_____
Joan B. Thompson
Administrative Judge